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No. 81-2197

In The

SUPREME COURT OF THE UNITED STATES

May Term, 1982

MARY C. KRANDA, Appellant

vs.

HOUSER-NORBORG MEDICAL CORPORATION
and KEIM T. HOUSER, M.D., Appellees

ON APPEAL FROM THE
COURT OF APPEALS OF INDIANA

MOTION TO DISMISS APPEAL

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HOUSER-NORBORG MEDICAL CORPORATION*
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*Houser-Norborg Medical Corporation is a professional corporation organized under the laws of the State of Indiana and the only stockholders in said corporation are the physicians employed by said corporation.

PARTIES

All the parties to this case are listed in the caption.

TABLE OF CONTENTS

PARTIES..... 2

TABLE OF AUTHORITIES..... 4, 5

MOTION TO DISMISS APPEAL..... 6

CONCLUSION..... 12

CERTIFICATE OF SERVICE..... 13

TABLE OF AUTHORITIES

Constitution:

U. S. CONSTITUTION, Article V.....6

U. S. CONSTITUTION, Article VII.....6

U. S. CONSTITUTION, Article XIV.....6

Statutes:

Indiana Malpractice Statute.....5
6, 7, 8

Cases:

F.C.C v. Pacific Foundation, (1978)
428 U.S. 726, 57 L.Ed.2d 1073,
98 S.Ct. 3026.....7

Herb v. Pitcairn, (1945), 324 U.S. 117,
65 S.Ct. 459, 89 L.Ed. 789.....7

Johnson v. St. Vincent Hospital, (1980),
404 N.E.2d 585.....7

Rescue Army v. Municipal Court, (1947),
331 U.S. 549, 568-569, 91 L.Ed. 1666,
67 S.Ct. 1409.....7

TABLE OF AUTHORITIES

Other Authority:

28 U.S.C. § 2403(b).....5

Supreme Court Rule 16(b).....5, 7

Supreme Court Rule 28 .4.(c).....5

MOTION TO DISMISS APPEAL

I.

APPELLANT HAS FAILED TO COMPLY WITH SUPREME COURT RULE 28

Supreme Court Rule 28 .4.(c) requires that the initial pleading, motion or paper filed in this Court shall recite 28 U.S.C. § 2403(b) may be applicable and shall be served upon the Attorney General of the State. Appellant's Jurisdictional Statement fails to mention that this requirement of service on the Attorney General of the State of Indiana has been complied with. It appears from the Jurisdictional Statement certificate of service that the Attorney General of the State of Indiana has not been made a party to this action nor notified of this action.

II.

THIS APPEAL SHOULD BE DISMISSED PURSUANT TO SUPREME COURT RULE 16(b) FOR THE REASON THAT THE JUDGMENT OF THE COURT OF APPEALS OF INDIANA AND THE INDIANA SUPREME COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

Appellant has filed a Jurisdictional Statement alleging that the Indiana Malpractice Statute is unconstitutional. Appellant has cited various reasons for which this Court should declare the Indiana Malpractice Statute unconstitutional. The reasons given in the Appellant's Jurisdictional Statement are rather redundant, but to summarize the cited reasons, Appellee lists the following:

1. That the medical review procedure outlined in the Indiana Malpractice Statute is in violation of Article V and Article XIV of the United States Constitution in that it is costly and time-consuming.

2. That the Indiana Malpractice Statute creates an artificial, arbitrary and

unreasonable legislative classification between persons subjected to its provisions.

3. That the monetary limitation under the Indiana Malpractice Statute is unconstitutional and that reasonable damages are prohibited in violation of the due process clause of the United States Constitution.

4. That the Indiana Malpractice Statute violates the VII Amendment of the United States Constitution because Appellant is deprived of a trial by an impartial jury.

5. That the requirement of payment of the expenses of a screening panel under the Malpractice Statute violates the due process clause of the XIV Amendment of the United States Constitution.

It should be pointed out to the Court that the Indiana Malpractice Statute was upheld

by the Court of Appeals of Indiana in this case and that the Indiana Supreme Court denied transfer. It should also be noted that in a separate decision, the Indiana Supreme Court upheld the constitutionality of the Indiana Malpractice Statute in the case of Johnson v. St. Vincent Hospital, Inc.(1980), 404 N.E.2d 585. In the Johnson case, the Indiana Supreme Court answered each and every argument advanced by Appellant in this case.

Appellee contends that this appeal should be dismissed pursuant to Supreme Court Rule 16(b) in that the judgment of the Court of Appeals of Indiana and the denial of transfer by the Supreme Court of Indiana rests on an adequate non-federal basis. In other words, the Appellant was given his "day in court" because this case was fully tried by a jury and judgment was rendered in favor of

Appellee. As a result of the decision of the jury, all of the arguments of Appellant are moot and this Court should not entertain the question of the constitutionality of the Indiana Malpractice Statute since this case was decided by a jury on an adequate non-federal basis. Herb v. Pitcairn(1945), 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789; Rescue Army v. Municipal Court(1947), 331 U.S. 549, 568-569, 91 L.Ed. 1666, 67 S.Ct. 1409; F.C.C. v. Pacifica Foundation(1978), 438 U.S. 726, 57 L.Ed 2d 1073, 98 S.Ct.3026. In Herb v. Pitcairn(1945), 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789, this Court stated that there must be strict adherance to the rule that it must affirmatively appear that the federal question was decided and that its decision was essential to the disposition of the case. This Court has long followed scrupulously the rule that it

will not review a judgment of a state court that rests on an adequate and independent ground in state law.

The independent ground in state law in this particular case is the fact that this case was fully litigated before a jury and the jury found against the Appellant on the facts presented in evidence. Therefore, the constitutionality of the Indiana Malpractice Statute, as applied in this particular case, is of no consequence to the rights of the Appellant.

CONCLUSION

This Court should dismiss this appeal for the reason that the judgment in this case rests on an adequate and non-federal basis.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing was served upon Daniel J. Harrigan, Attorney at Law, Bayliff, Harrigan, Cord, Maugans and Russell, P.C.,P.O. Box 2249, Kokomo, Indiana 46901; David L. Matthews, Attorney at Law, Matthews-Petsche & Associates, 509 West Washington, South Bend, Indiana 46601; and Attorney General of the State of Indiana, Linley Pearson, 219 State House, Indianapolis, Indiana 46204, by depositing same in the United States mail this 19 day of August, 1982, postage prepaid.

Edward A. Chaplean

Edward A. Chaplean